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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Gi-Go Toys Factory, Ltd.

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Serial No. 75/851,085

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Anthony O. Cormier for Gi-Go Toys Factory, Ltd.

Patricia A. Horrall, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

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Before Seeherman, Hohein and Walters, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Gi-Go Toys Factory, Ltd. has appealed from the final refusal of the Trademark Examining Attorney to register BABY TUBBY, with the word "Tubby" disclaimed, for "dolls and doll accessories."[1] Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C.

[1] Application Serial No. 75/851,085, filed November 18, 1999, and asserting a bona fide intention to use the mark in commerce.

1052(d), on the ground that applicant's mark so resembles the mark TUBBY, in the stylized form shown below, which is registered for, inter alia, "doll making kits,"[2] that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.

Before we discuss the substantive issue, we turn to some evidentiary matters. With its response to the first Office action applicant submitted a listing taken from the USPTO's electronic search system (TESS) which indicated 46 marks containing the term TUBBY. The listing shows only the mark, its serial number or registration number, and

[2] Registration No. 1,057,536, issued February 1, 1977; Section 8 affidavit accepted; Section 15 affidavit received; renewed. The registration also lists, in the identification of goods, comics magazines, coloring books and self-erasing writing pads in Class 16, and jigsaw puzzles in Class 28. However, because the Examining Attorney has discussed only the doll-making kits, we have assumed that this is the only item with which she contends a likelihood of confusion exists.

whether it is alive or dead. Such a listing is ordinarily insufficient to make the registrations of record. To make a registration of record, a copy of the registration, either of the paper USPTO record, or a copy taken from the electronic records of the USPTO, should be submitted. See **In re Duofold Inc.**, 184 USPQ 638 (TTAB 1974); **In re Volvo Cars of North America Inc.**, 46 USPQ2d 1455, n. 2 (TTAB 1998). However, because the Examining Attorney did not advise applicant of this deficiency at a point when applicant could have corrected it, but instead discussed the evidence, we will consider the listing for whatever probative value it has. That value is limited, for several reasons. First, the listing does not show the goods or services for the particular marks. Second, almost half of the marks are indicated to be for applications, and third-party applications have no probative value other than as evidence that the applications were filed. See **In re Phillips-Van Heusen Corp.**, 63 USPQ2d 1047, n. 4 (TTAB 2002). Third, of the marks which are indicated to have been registered, half of them are listed as "dead." Thus, there are only eleven currently-existing third-party registrations on this list.

The Examining Attorney has also pointed out that only applicant's application and the cited registration are for

dolls. The Examining Attorney has submitted, in support of this statement, an "X-search 1.1 printout." We note that this printout has its own evidentiary deficiencies. It appears to be a search strategy which lists "hits," but, frankly, would be readily intelligible only to those who are familiar with the X-search system.[3] We think it incumbent upon Examining Attorneys, if they wish to submit evidence of this type, to provide an explanation as to their search strategy, and what the hits actually show, rather than a mere conclusory statement.

However, in this case applicant does not dispute that the only TUBBY marks relating to dolls are its own and that shown in the cited registration. Therefore, we deem

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[3] The printout reads, in its entirety:

#	Total Marks	Dead Marks	Live Viewed Docs	Live Viewed Images	Status/ Search Duration	Search
01	44	N/A	0	0	0:01	"tubby" [bi,ti]
02	24748	N/A	0	0	P/0:01	"doll" [gs]
03	2	0	2	2	0:01	1 and 2

Session started 8/29/01 10:36:40 AM
Session finished 8/29/01 10:37:15 AM
Total search duration 0:03 minutes
Session Duration 0:35 minutes

Default NEAR limit= 1 ADJ limit= 1

applicant and the Examining Attorney to have stipulated this point.

This brings us to the substantive issue of whether applicant's mark, if used on its identified goods, is likely to cause confusion with the cited mark. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Here, we have no doubt that the marks are very similar. The slight stylization of the cited mark does not distinguish it from applicant's mark, and applicant does not argue this point. The fact is, because applicant has applied for BABY TUBBY as a typed drawing, if it were to obtain a registration its protection would extend to use of the mark in the same or a similar stylized font as the registered mark. Nor does the addition of the descriptive word BABY in applicant's mark serve to distinguish it from

the cited mark.[4] It is well established that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Because BABY describes applicant's dolls, it is the word TUBBY that consumers will look to as the major source-identifying feature, and therefore it is the dominant element of applicant's mark. Further, because both marks otherwise consist of the identical word TUBBY, they convey very similar commercial impressions. Certainly if TUBBY and BABY TUBBY were used on the same goods, dolls, they are likely to be viewed as identifying goods emanating from the same source, with TUBBY being considered as a shortened form of BABY TUBBY, or BABY TUBBY being considered as an incarnation of the TUBBY doll in a baby form.

[4] In its response to the first Office action applicant argued that BABY was not a descriptive term for its goods, although we note that it complied with the Examining Attorney's requirement that the word be disclaimed. Applicant did not pursue this argument in its appeal brief and, indeed, acknowledged that BABY is descriptive. p. 3.

However, the marks are not both for dolls. Rather, the cited registration identifies the goods as "doll making kits." Applicant asserts that there are significant differences between dolls and doll-making kits in terms of the customers for the products and the channels of trade in which they are marketed. Specifically, applicant contends that dolls are finished goods, purchased off-the-shelf, and that they are found in the doll sections of department stores and toy stores. On the other hand, applicant asserts that doll-making kits "are sold to skilled craft and hobbyist consumers who are primarily interested in the process and challenge of constructing dolls from raw materials or components." Brief, p. 5. In support of this contention, applicant has submitted materials obtained from the Internet regarding doll making. For example, a question-and-answer page which appears to relate to a company called "Doll Express" contains the following:[5]

> Q: What is included in the kit?
>
> A: The kit includes a fired and painted head with eyes and a body pattern so that one can assemble it themselves and dress it as they wish. The wigs are available but are not included in the price.

[5] www.pape-ent.com/dollxprs/html/faq.html.

After reviewing the materials which are of record, we find that there is evidence that the same companies which sell doll-making kits also sell dolls. For example, a general listing of websites turned up by a search for "doll making kits" on CompuServe.com includes the following:

> Daydream's Window—dolls and miniatures
> Fairies, dolls and kit sets made by Millie winner Pam Jackson....
> http://homepages.paradise.net.nz/~landsbri
>
> Doll Creations
> High quality porcelain doll reproductions, blank and unpainted bisque, as well as ready to dress assembled dolls.
> http://www.dollcreations.com
>
> Kistler Dolls
> A seven year dealer for Apple Valley Doll Works, and new distributor for The Baby Makers vinyl dolls and kits.
> http://www.homestead.com/kistlersdolls/Untitled/...
>
> Kimekomi and Japanese Crafts
> Kimekomi and Japanese crafts: dolls from Japan, Japanese dollmaking and crafts.
> http://www.japanesedollsandcrafts.com

Further, an advertisement for LaDonna's Doll Emporium features a "Sugar Britches" doll as both a kit, for $55, or as a ready-to-dress completely assembled doll for $75.[6] And the website for "Doll Express," cited above, states that

[6] http://www.angelfire.com/biz/ladonnasdolls/prices.html.

"At this Web site you will find supplies for all your porcelain Doll Making needs as well as completed Dolls."

Thus, this evidence shows that doll-making kits and dolls may be sold to the same purchasers through the same channels of trade, and that the same companies may offer both dolls and doll-making kits, and may offer them under the same trademarks. In view thereof, we find that applicant's identified dolls and the doll-making kits identified in the cited registration are related goods, and that, if applicant were to use the mark BABY TUBBY on its dolls, it is likely to cause confusion with TUBBY doll-making kits.

In reaching this conclusion, we recognize that "tubby" has a suggestive significance and, therefore, the cited registration is entitled to a more limited scope of protection than an arbitrary or invented term.[7] However, although the registered mark TUBBY is not entitled to a

[7] Our finding of a suggestive significance is not based on the third-party registrations submitted by applicant, discussed previously. Because there is no evidence of third-party TUBBY marks for dolls or doll-making kits, the third-party registrations do not show that "tubby" has a particular significance for those goods. However, just as third-party registrations can be used in the manner of dictionary definitions to show that a term has a particular meaning, so too, obviously, can dictionary definitions themselves. And in this case, we take judicial notice that one definition of "tubby" is "short and fat." The American Heritage Dictionary of the English Language, © 1970.

broad scope of protection, even the limited ambit of protection to be accorded the cited registration is broad enough to preclude the use of such a similar mark as BABY TUBBY for such closely related goods as dolls and doll accessories.

We have also considered applicant's contention that doll-making kits are bought by specialized purchasers, namely, skilled craft and hobbyist consumers. Even if we were to consider such purchasers as being more discriminating than other members of the public, because of the strong similarities of the marks, and the evidence that doll-making kits and dolls may be sold under the same marks to this same class of purchasers through the same channels of trade, we find that such purchasers, familiar with TUBBY for doll making kits, are likely to be confused by the use of BABY TUBBY for dolls and doll accessories.

Moreover, although applicant characterizes doll-making kits as relating to a "detailed and highly artistic craft," brief, p. 5, the identification in the cited registration is not so limited. The term "doll making kits" is broad enough to encompass inexpensive craft items for use by young children, the same children who would play with dolls. These kits would be sold in the same toy stores that sell dolls, and children, as well as the adults who

purchase items for them, are likely to assume that TUBBY doll making kits and BABY TUBBY dolls and accessories come from the same source.

Decision: The refusal of registration is affirmed.